

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES A. JOHNSON)	
Claimant)	
VS.)	
)	Docket Nos. 225,959 & 225,960
RONNIE COX FLATWORK)	
Respondent)	
AND)	
)	
AMERICAN STATES INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the Order of November 8, 1997, and the Order Nunc Pro Tunc of December 8, 1997, by Administrative Law Judge Julie A. N. Sample, wherein the Administrative Law Judge granted claimant medical treatment for the injuries suffered on July 3, 1997. The Administrative Law Judge went on to deny temporary total disability compensation and the payment of outstanding past medical bills.

The Order and Nunc Pro Tunc Order of the Administrative Law Judge list only Docket No. 225,959. Likewise, the respondent's application lists only the single docket number. However, the preliminary hearing transcript and the briefs filed list Docket Nos. 225,959 and 225,960. In addition, the Order and Order Nunc Pro Tunc of the Administrative Law Judge consider and discuss both the October 7, 1996, and July 3, 1997, dates of accident and the parties, in their briefs, argue both dates of accident. The Appeals Board, therefore, finds that the appeal in this matter is as to both Docket No. 225,959 and 225,960.

ISSUES

Docket No. 225,959

Whether claimant provided timely written claim for the accidental injury of October 7, 1996, pursuant to K.S.A. 44-520a?

Docket No. 225,960

- (1) Whether claimant suffered accidental injury on July 3, 1997.
- (2) Whether claimant's accidental injury arose out of and in the course of his employment with respondent.
- (3) Whether claimant provided notice for the accident of July 3, 1997, pursuant to K.S.A. 44-520, or if not, whether claimant had just cause for failing to provide said notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant suffered accidental injury while working as a concrete worker for respondent on October 7, 1996. Claimant reported this accident to respondent, was provided medical care through respondent's authorized doctor, and was paid approximately six weeks temporary total disability compensation. Claimant was returned to work after receiving medical care with the last date of medical treatment being provided November 29, 1996. Claimant continued working for respondent through July 3, 1997. Claimant has now alleged he suffered a series of accidents culminating on July 3, 1997, his last day worked with respondent.

Respondent denies claimant provided written claim for the accidental injury of October 7, 1996.

K.S.A. 44-520a states in part:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation

In this instance, it was acknowledged by the parties that written claim was submitted August 27, 1997. As this is more than 200 days beyond the last date of compensation on November 29, 1996, the Appeals Board finds that claimant failed to submit timely written claim pursuant to K.S.A. 44-520a for the accident of October 7, 1996.

In Docket No. 225,960, claimant alleges accidental injury through a series of injuries culminating on July 3, 1997, claimant's last date of employment with respondent. Respondent denies that claimant met with accidental injury arising out of and in the course

of his employment on the dates alleged and further contends that claimant failed to provide timely notice pursuant to K.S.A. 44-520.

Claimant described his injury as a series of injuries resulting from his labors with respondent through July 3, 1997, his last day of employment with respondent. Respondent contends that claimant injured himself after July 3, 1997, while working on his truck transmission. While respondent has provided witnesses who alleged to have heard claimant telling respondent's owner Mr. Cox that he had injured his back while working on his transmission, claimant has submitted deposition and affidavit testimony from other witnesses who deny that claimant ever worked on the truck transmission. Claimant himself denies ever having worked on the truck transmission. The Appeals Board finds that claimant's testimony regarding how the accident occurred is credible. The claimant describes ongoing and increasing symptomatology while doing concrete work for respondent and the Appeals Board finds claimant's version of the accidental injury is credible and sufficient to sustain claimant's burden of proof. Therefore, the Appeals Board finds that claimant suffered accidental injury arising out of and in the course of his employment with respondent through a series of accidents ending on July 3, 1997.

K.S.A. 44-520 states in part:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant contends that he told Mr. Cox, the owner of respondent company, on several occasions of his ongoing back problems. However, under cross-examination claimant acknowledged that he at no time while working for respondent advised Mr. Cox that he had suffered a work-related accident or that his back problems were in any way related to his work with respondent. Respondent acknowledges being aware that claimant had ongoing back problems and had back complaints for several years. Respondent testified that claimant had discussed his ongoing back difficulties at the time of his hire

several years earlier. Respondent further acknowledges being aware of the back problems suffered by claimant in October 1996. However, there is no evidence to contradict claimant's own acknowledgment that he failed to advise respondent of any back injury or incident leading up to July 3, 1997, the last day of work.

Claimant alleged that he had advised respondent he was taking time off after July 3, 1997, due to his back problems and due to difficulties with his truck transmission which he planned to have repaired. Claimant later acknowledged that when he left work on or about July 3, 1997, the only discussion revolved around claimant's truck and the transmission and no mention was made of claimant's back problems or any relationship to the work being performed by claimant. The first time claimant provided notice to respondent that he was alleging an accidental injury through July 3, 1997, was after claimant's examination with Dr. Dennis Cromwell which occurred on July 14, 1997. Respondent's representative and owner, Mr. Cox, acknowledged being approached by claimant on a Wednesday at which time claimant discussed his ongoing back symptomatology and advised Mr. Cox of the work-related nature of this problem. In reviewing the calendar for 1997, the Appeals Board notes that July 14, 1997, is a Monday. This would indicate that claimant approached Mr. Cox on July 16, 1997, and discussed these work-related accidents.

The Court of Appeals, in McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996), was asked to consider the 10-day statutory limit for requesting review by the Workers Compensation Appeals Board under K.S.A. 44-551. In McIntyre, the Court of Appeals concluded that certain limitations set forth under the Workers Compensation Act were controlled by the language of K.S.A. 60-206(a) which states in part:

When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

When using the time computations mandated by McIntyre, the Appeals Board concludes that the conversation between claimant and Mr. Cox, which occurred on July 16, 1997, was within ten days of the July 3, 1997, date of accident alleged by claimant. Therefore, claimant has satisfied the requirements of K.S.A. 44-520 in providing notice to respondent of an accidental injury occurring on July 3, 1997.

Claimant further raises an issue regarding whether the Appeals Board has jurisdiction over this appeal, arguing that the trier of fact, *i.e.*, the Administrative Law Judge, has the discretion to receive testimony and evidence and to apply such evidence to the law in formulating her ruling. Claimant goes on to argue, in his brief, that "this review board has an obligation to defer to the findings of the Administrative Law Judge, unless there is a finding of gross error." A review of the Kansas Workers Compensation Act fails to uncover any such language as this in either the statutes or in case law. K.S.A. 1997 Supp. 44-555c grants the Appeals Board the right to review questions of law and fact as presented and shown by a transcript of the evidence and proceedings as presented, had, and introduced

before the Administrative Law Judge. K.S.A. 1997 Supp. 44-551 grants the Appeals Board the right to review all final orders, awards, modifications of awards, or preliminary awards under K.S.A. 1997 Supp. 44-534a and amendments thereto made by an administrative law judge and holds these subject to review by the Appeals Board. The Appeals Board is given authority to grant or refuse compensation, to increase or diminish any award of compensation, or to remand the matter to the administrative law judge for further proceedings. K.S.A. 1997 Supp. 44-551(b)(1). Claimant's contention that the Appeals Board does not have jurisdiction to consider this matter is contradicted by K.S.A. 1997 Supp. 44-551 and K.S.A. 1997 Supp. 44-555c.

Claimant's attorney further argues that the claimant should be entitled to all benefits under the Workers Compensation Act, specifically temporary total disability compensation, until released to employment with these benefits to begin after the last date of work, July 3, 1997. K.S.A. 1997 Supp. 44-534a and K.S.A. 1997 Supp. 44-551 do limit the scope of Appeals Board review of actions from preliminary hearing orders. The Administrative Law Judge is given specific authority in K.S.A. 1997 Supp. 44-534a to decide issues dealing with temporary total disability compensation and ongoing medical treatment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order and the Order Nunc Pro Tunc entered by Administrative Law Judge Julie A. N. Sample, dated November 8, 1997, and December 8, 1997, respectively, should be, and are hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

c: Laura J. Duchardt, Kansas City, MO
Gregory D. Worth, Lenexa, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director